

(25,895)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1065.

NORTHERN PACIFIC RAILWAY COMPANY AND THE
FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
PETITIONERS,

vs.

E. W. McCOMAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON.

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1-4 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Complaint.

The plaintiff for cause of suit against the above named defendant alleges:

I.

That the Northern Pacific Railway Company is now, and was at all times mentioned in this complaint, a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owning and operating a railroad line and owning lands connected therewith in the State of Oregon.

II.

That the Farmers Loan & Trust Company, Trustee, is and was at all times herein mentioned, a corporation duly incorporated organized, and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

III.

That the plaintiff is now the owner in fee and in possession of the following described lands situated in Umatilla County, State of Oregon, to-wit: Lots One (1), Two (2), and Four (4), in Section Five (5), Township (5), North, Range Thirty (30) East of the Willamette Meridian:

5 & 6 The Northeast Quarter ($NE\frac{1}{4}$), The Northwest Quarter ($NW\frac{1}{4}$), the North Half of the Southwest Quarter ($N\frac{1}{2}$ of $SW\frac{1}{4}$); the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$); the Southwest Quarter of the Southwest Quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$), and the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section Seven (7), Township Five (5) North, Range Thirty (30) East of the Willamette Meridian; and the Northwest Quarter ($NW\frac{1}{4}$) of the Northeast Quarter ($NE\frac{1}{4}$) and the Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section Eight (8), Township Five (5), North, Range Thirty (30) E. W. M.; and the said above described lands are not in the possession of any other person or persons.

IV.

That the plaintiff and his grantors have been the owner in fee and in possession of the said lands under a claim of right, title and interest and color of title thereto, for more than ten (10) years prior to the commencement of this suit, adversely to the defendants herein and all the world.

V.

That the defendants and each of them and other persons unknown to the plaintiff, claim to have some right, title or interest in the said lands adverse to the plaintiff.

Wherefore, the plaintiff prays for a decree of this Court quieting his title thereto, and declaring the plaintiff to be the owner in fee of said lands; and that the plaintiff have judgment against the defendants herein for his costs and disbursements in this suit; and for such other and further relief as may be equitable.

SWEEK, FOUTS & SHELTON &
R. J. SLATER,

Attorneys for Plaintiff.

(Verified.)

7 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Answer.

Now come the defendants, Northern Pacific Railway Company and The Farmers Loan and Trust Company, and make this their answer to the complaint herein.

These defendants admit the allegations of paragraphs I and II of the complaint with reference to the organization and business of these defendants.

These defendants deny that plaintiff is the owner in fee and in possession of the lands described in the complaint, except that defendants admit that plaintiff is the owner and in possession of the south half of northeast quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$), south half of northwest quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) and northwest quarter of southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$), section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian.

These defendants deny that plaintiff and his grantors have been the owners in fee and in possession of the land described in the com-

plaint under a claim of right, title and interest and color of title thereto for ten years prior to the commencement of this suit adversely to these defendants and to all the world.

8 These defendants admit that the defendant Northern Pacific Railway Company claims to be the owner in fee of and the defendant The Farmers Loan and Trust Company claims to have an interest in, all of the lands described in the complaint, excepting said south half of northeast quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$), south half of northwest quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) and northwest quarter of southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$), section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian, hereinabove referred to, and excepting lot four (4) in section five (5), the north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7) and the northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8), all in township five (5) north of range thirty (30) east of the Willamette Meridian.

And the defendants make the following further and separate answer to the complaint herein:

On or about December 31, 1907, the United States conveyed to the defendant, Northern Pacific Railway Company by patent, said lot one (1) of section five (5) in township five (5) north of range thirty (30) east of the Willamette Meridian; on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent lot two (2) of said section five (5); on or about November 25, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent, north half of northwest quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$)—also known as lots one (1) and two (2) of section seven (7) in said township and range; on or about June 8, 1906, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northeast quarter of southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of said section seven (7); and on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company

9 by patent the northwest quarter of southeast quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$), southwest quarter of southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) and southeast quarter of southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) of said section seven (7). These defendants allege that by virtue of the title so conveyed by said patents of the United States the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of the lands so conveyed by said patents, and the defendant The Farmers Loan and Trust Company has a lien thereon under and by virtue of a mortgage or deed of trust made and executed by the defendant Northern Pacific Railway Company. Each and all of said patents so conveyed the land to the defendant Northern Pacific Railway Company were issued by the proper officers of the United States under an Act of Congress of the United States approved July 2, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern Route."

For their further and separate answer to the complaint herein, these defendants allege that on and prior to October 11, 1912, said lot four (4) of section five (5) in township five (5) north of range thirty (30) east of the Willamette Meridian was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List by which it made selection in conformity with the laws of the United States of said lot four (4); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said lot four (4).

10 For their further and separate answer to the complaint herein, these defendants allege that on and prior to the 23rd day of July, 1908, said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in conformity with the laws of the United States of said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to March 19, 1908, said northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8) in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on that day the United States conveyed the said tracts by patents duly and lawfully issued to the defendant Northern Pacific Railway Company. Thereafter and prior to the commencement of this suit the defendant Northern Pacific Railway Company conveyed the said tracts to

Joseph C. Scott and as these defendants are informed and believe said Joseph C. Scott is still the owner in fee of said tracts. The said Joseph C. Scott, as these defendants are informed and believe, is still living and this suit as to the said northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8)

cannot properly proceed to a determination without the presence as a party thereto, of the said Joseph C. Scott.

Wherefore, these defendants pray that this court adjudge and decree that the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of said lots one (1) and two (2) of section five (5), north half of northwest quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) of section seven (7), northeast quarter of southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of section seven (7) and northwest quarter of southeast quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$), southwest quarter of southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) and southeast quarter of southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) of section seven (7), all in township five (5) north of range thirty (30) east of the Willamette Meridian, and that its title thereto be quieted, save as to the mortgage lien thereon of the defendant The Farmers Loan and Trust Company and that the defendant The Farmers Loan and Trust Company has a lien upon said lands by virtue of a mortgage or deed of trust executed and delivered by the defendant Northern Pacific Railway Company; and that this suit be dismissed as to the said lot four (4) of section five (5), north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7) and northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8) in township five (5) north of range thirty (30) east of the Willamette Meridian; that these defendants be given judgment for costs and their disbursements, and be given such other and further relief as may be equitable.

CAREY AND KERR AND
C. A. HART,

*Attorneys for Defendants Northern Pacific
Railway Company and The Farmers Loan
and Trust Company.*

(Verified.)

13 & 14 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. MCCOMAS, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Reply.

Comes now the plaintiff and for reply to the answer filed herein. admits and denies as follows:

I.

For reply to the first further and separate answer the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

II.

For reply to the second further and separate answer the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

III.

In reply to the third further and separate answer plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

Wherefore, the plaintiff prays as in the complaint.

SWEEK, FOUTS & SHELTON AND
R. J. SLATER,

Attorneys for Plaintiff.

(Verified.)

15 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Opinion.

Passing preliminary statements, there being no disagreement as to facts, and without a detailed discussion of the law or of the numerous cases cited by one side or the other, I will state briefly the conclusion reached after a very careful examination of the authorities cited, and a very careful consideration of the respective briefs.

It is conceded that the lands in controversy passed to the Northern Pacific Railroad Company immediately upon the filing by said company of its map of definite location on June 29, 1883, unless at that time the said lands were not free from "preemption or other claims or rights."

It is the contention of defendant that the Swamp Land Selection List of the State of Oregon was at the time of the filing of the map of definite location a "claim" against the land which would exempt same from the grant to the railway company.

If this contention be upheld then it follows as a matter of course that the lands remained public lands, and title did not pass to plaintiff or his predecessors by adverse possession. Otherwise title did pass.

In the case of Pengra vs. Munz 29 Fed. 830 it is held by Judge Deady in effect that the failure of the proper state officials to file a list of the lands selected under the Swamp Land Act prior to the
16 year 1872 was relinquishment of any right or claim the state might have as against the lands.

This decision is severely criticised by counsel for defendant and it

is strongly urged that it should not be followed. The case of *Gaston vs. Stott* 5 Or. 48 is cited as holding a contrary doctrine, but the point of importance in that case was as to whether or not the grant was one in *præsentia*, and the opinion of Justice McArthur was later expressly overruled in the cases of *Small vs. Lutz* 41 Or. 577, and *Morrow vs. Warner Valley Stock Co.* 56 Or. 329.

These last mentioned cases having been decided after the Supreme Court of the United States had passed upon the subject in the cases of *Michigan L. & L. Co. vs. Rust* 168 U. S. 589 and *Brown vs. Hitchcock* 173 U. S. 473.

However *Gaston vs. Stott* if authority to be recognized for any purpose, after being overruled as mentioned, holds that the state did not lose its rights because its officers did not act more promptly.

This contention is supported by later authorities as cited by counsel for defendants, and while there is to be found both law and basis for argument on each side of the question, it seems to me that defendant's position as to this question must ultimately prevail whenever the higher courts are called upon to decide.

It is not so clear however that subordinate State Courts should not follow the case of *Pengra vs. Munz* *supra* until the question is finally settled by the appellate courts upon the particular question raised here. A Federal question is involved and while indeed the State courts are only bound by the ruling of the Supreme Court of the United States, yet there should be manifest error before the refusal to follow the U. S. District Court upon a Federal question.

But assuming that the state forfeited no rights by its failure to act more promptly, there still remains what seems to me to be in its final analysis the real question in the case, and that is,—what was meant by the words, "free from preemption or other claims or rights"? in the Act of July 2, 1864?

It is plaintiff's contention that these words referred only to claims of record or to those recognized officially by some officer of the Government. He cites the case of *N. P. R. R. Co. vs. Coleburn* 164 U. S. 383. In this case it is held that the claim or right need not necessarily be one of record, but that it must be a bona fide claim, and such as indicates an intention to perfect the claim.

When analyzed there is no inconsistency in the several decisions urged upon the court by both parties to this suit.

But there is to be found in all of the decisions upon the subject an evident purpose to say that it is not every claim that answers the requirements of the law so as to prevent the passing of title under the particular grant then being considered. It is settled beyond controversy that the claim need not be one of record, but it seems to me to be equally well settled that where under a given state of facts a court of Equity should say that a party is guilty of laches in not pursuing a claim or demand, then as a matter of law by non-action the claim though sufficient, at one time, becomes insufficient when it is allowed to become stale. And while it may be assumed that the filing of the Swamp Land List in 1872 constituted a claim sufficient at the time to withhold the selections from passing had the map of definite location been then or within a reasonable time thereafter filed by the

railway company, yet it by no means follows that such would be the legal effect for all future time.

It seems to me that the court should look to the conditions existing in the year 1883, and from all the facts and circumstances say whether at that time there was a "claim" within the contemplation of the law.

18 The question is not easy of solution but it is my opinion that if the State of Oregon ever had a valid claim against this land, there had been no act to indicate at the time of the definite location that the state was still claiming this land under the Swamp Land Act or otherwise. In fact would seem that there had been a complete abandonment of any claims the state theretofore had, and this conclusion is backed up by the subsequent acts of both the State and the United States, when patents passed to the defendant. It would also seem that defendants act in first accepting the patents and then undertaking to re-convey to the Government was done to prepare for this particular case.

Upon the case as a whole, I am of the opinion that even though the States claim was filed within the time limit, and at the time constituted a "claim" within the meaning of the Act of 1864, and within the construction of the word as found in the decisions cited, yet by the same authorities, the claim made by the state in 1872 would not be recognized by the courts as a claim in 1883 sufficient to exclude the lands from the grant to the defendant.

It follows under the evidence that plaintiff and his predecessors obtained title by adverse possession, and finding will be made accordingly.

March 28, 1916.

GILBERT W. PHELPS,
Circuit Judge.

19 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE FARMERS Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Findings of Fact and Conclusions of Law.

This matter coming on now for consideration by the Court, the plaintiff having heretofore appeared in this cause by Messrs. Raley & Raley, his Attorneys, and the defendant appearing herein by their counsel, Carey & Kerr and C. A. Hart, Esq., and the Court having heretofore taken and heard such testimony as each of the parties hereto had to offer in said cause, and having listened to arguments and duly considered the briefs of both plaintiff and defendants, and

being advised upon the record, the evidence and testimony in said cause, now makes, finds and files the following

Findings of Fact.

I.

That the plaintiff and defendant, through their respective counsel, have filed a stipulation in this cause, in words and figures as follows:

Plaintiff and defendant hereby stipulate that the following statement with reference to the lands described in the complaint may be taken as the facts in this case.

Section 5, Township 5, North of Range 30 East.

Lot One. Plaintiff hereby withdraws the claim made in the complaint as to this lot, and decree may be entered herein confirming defendant's title.

20 Lot Two. This lot was patented to defendant Railway Company on May 4, 1909, under the terms of the Act of July 2, 1864, (13 Statutes at Large 365). Previously, however, it had been included in a so-called Swamp Land Selection List filed by the State of Oregon under date of November 23, 1872, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860. The claim of the State of Oregon thus asserted by the filing of this Swamp Land List has never been adjusted. On August 10, 1892, the State of Oregon conveyed this lot to Mary Switzler, and she thereafter conveyed said lot to plaintiff in this case.

On December 4, 1912, defendant Northern Pacific Railway Company, assuming that this lot was excluded from its grant because of the existence at the time of definite location of the Swamp Land claim of the State of Oregon, and that the lot therefore was patented to the Railway Company in error, reconveyed the said lot to the United States by deed dated December 5, 1912, and said reconveyance was duly recorded in the office of the County Clerk of Umatilla County on January 15, 1915, in Volume 82 of Deeds, pages 34 and 35.

Thereafter and on January 17, 1913, defendant Northern Pacific Railway Company filed in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, selecting Lot 2 in lieu of land lost from its grant of July 2, 1864, because of the classification as mineral lands of said lands within the place limits of the grant; and said Northern Pacific Railway Company claims said Lot 2 by virtue of said selection list (Transcript of Testimony and Proceedings) and by virtue of the terms and conditions of the Act of Congress, approved July 2, 1864.

Lot Four. This lot was included in the Swamp Land List filed

21 by the State of Oregon on November 23, 1872, (as described in the next preceding paragraph) and thereafter, to-wit: on August 10, 1892, was conveyed by the State of Oregon to Mary Switzler and by her to the plaintiff herein. Thereafter the swamp land claim thus asserted by the State of Oregon was rejected by the General Land Office of the United States.

Defendant Northern Pacific Railway Company made claim to this lot by the filing of its Mineral Indemnity Selection List No. 101, serial number 011236, which selection list was approved by the local land office of the United States on October 11, 1912; and defendant Railway Company now asserts claim to said lot by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Section 7, Township 5, North of Range 30 East.

The South Half of Northeast Quarter. The defendants in their answer disclaim any interest in this property and now repeat said disclaimer, and the title of the plaintiff in said tract may be confirmed by decree.

The North Half of Northeast Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872, (Under Swamp Land Act of Congress of 1850 and 1860 above referred to). The claim of the State thus asserted was therefore rejected by the General Land Office of the United States. On August 10, 1892, the State of Oregon conveyed the tract to Mary Switzler and John Switzler and by mesne conveyances said tract was later conveyed to the plaintiff herein.

22 Defendant Railway Company made claim to this tract by filing its Mineral Indemnity Selection List No. 67, serial number 0540, specifying, among other lands, this property, which selection list was approved by the local land office of the United States on July 23, 1908; and the defendant Railway Company makes claim to this tract by virtue of the filing of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

South Half of Northwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat their disclaimer and agree that plaintiff's title thereto may be confirmed by decree.

Lots One and Two (or Fractional North Half of Northwest Quarter). This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Act of Congress hereinbefore referred to), not yet adjusted. The tract was conveyed by the State of Oregon to John Switzler on August 10, 1892, and by him through mesne conveyances to plaintiff.

This tract was patented to defendant Railway Company on December 31, 1907. The Railway Company assuming that said tract was excluded from its grant because of the existence at the time of definite location of the swamp land claim of the State of Oregon, and assuming that the patent to the Railway Company was erroneous, reconveyed said tract to the United States under date of December 4,

1912, said conveyance being thereafter duly recorded in the office of the County Clerk of Umatilla County in Volume 82 of Deeds at pages 34 and 35.

Thereafter defendant Railway Company made claim to this tract by filing in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, dated January 17, 1913, which list specified, among other tracts, this property; and the Railway Company now asserts claim to this tract by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat said disclaimer and agree that plaintiff's title may be confirmed by decree.

23 Northeast Quarter of Southwest Quarter: This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Acts of Congress herein-above referred to). The claim of the State of Oregon thus asserted was therefore rejected by the General Land Office of the United States. Prior to such rejection, to-wit: March 15, 1895, the State of Oregon conveyed said tract to Delia Switzler and through mesne conveyances the tract was thereafter conveyed to plaintiff herein.

This tract was originally patented to the defendant Railway Company on June 8, 1906, under the terms of the Granting Act of July 2, 1864, (13 Statutes at Large 365). Defendant Railway Company assuming that said tract was excluded from its grant because of the existence of the swamp land claim of the State of Oregon at the time of definite location, reconveyed said tract to the United States on December 4, 1912, said reconveyance being duly recorded in the office of the County Recorder of Umatilla County in Book 82 of Deeds at pages 34 and 35.

Thereafter defendant Railway Company filed in the Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 106, which list specified this tract, and said selection list was on January 17, 1913, duly approved. Based upon the selection so made by the Railway Company, the tract was on May 25, 1914, patented to the defendant Railway Company, said patent being duly recorded in the office of the County Recorder of Umatilla County in Book 89 of Deeds at page 99. The Railway Company now asserts claim to said lot by virtue of said patent and by virtue of the rights given it by Act of Congress, approved July 2, 1864.

24 Northwest Quarter of Southeast Quarter;
Southwest Quarter of Southwest Quarter;

Southeast Quarter of Southwest Quarter: This land was patented to the defendant Railway Company on May 4, 1909. Plaintiff withdraws the claim made to it in the complaint herein and agrees that defendants' title thereto may be confirmed.

Section 8, Township 5 North of Range 30 East.

Northwest Quarter of Northeast Quarter;

Northeast Quarter of Northwest Quarter: The plaintiff now withdraws the claim made in the complaint as to this land and agrees that defendant's title thereto may be confirmed by decree.

All of the lands in controversy in this suit are within the forty mile place limits of the branch line of the Northern Pacific Railway Company constructed from Ainsworth to Yakima City. The line of definite location for said branch line of Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864 (13 Statutes at Large 365) on the 29th day of June, 1883; that no action has been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

JOHN B. SWITZLER, being called and sworn as a witness on the part of plaintiff testified as follows:

Direct examination by Mr. Raley:

Q. How old are you?

A. I will be seventy-six in May.

Q. How long have you lived in Umatilla County?

A. I don't remember just when I did come to Umatilla County. I came right on that island though, when I did come.

Q. Did you ever get a deed from the State of Oregon to what is known as Switzler's Island, or parts of it?

A. Yes, sir; I got a deed from the State.

25 Q. Where were you living at the time you got that deed?

A. I was living on the island at the time.

Q. Who was living there with you?

A. My family was with me of course.

Q. How long had you been living there prior to the time you got the deed from the State?

A. Several years, but I don't really remember about how long I did live there; I know it was several years before I got the deed from the State.

Q. Did the deed run directly from the State to you for all of it?

A. Yes, sir; all of it.

Q. Did anybody else buy any land on the island besides what you bought?

A. No, sir; none that I know of.

Q. Who is Mary Switzler?

A. My wife.

Q. Did she buy some land there?

A. Yes, sir; but that is pretty near the same thing, isn't it?

Q. No, sir; not in law; Now, who is Delia Switzler?

A. My daughter.

Q. Did she buy some land from the State at that time?

A. Yes, sir; all the same time.

Q. After these deeds ran from the State to you and your wife, how long did you live upon Switzler's Island, until you sold it?

A. I lived upon it up to the time I sold it to Mr. McComas you may have some record of it.

Q. Then continuously from the time you got deeds from the State, you and your wife and daughter, up to the time you conveyed to McComas, you and your family lived on the land included in those deeds, did you?

26 A. Yes, sir; all the time. The island was never left one day alone, but I didn't have to live there, but it never was left alone, I always had cattle and stuff to take care of, but while my wife was off to Walla Walla sending the youngsters to school, but we lived there.

Q. Did you and those members of your family who received deeds to that land on the island reside there continuously?

A. Yes, sir.

Q. Now, what improvements were placed on the lands included in those deeds by you and your family during the time you lived on it and prior to the time you sold it to McComas?

A. I had built a house, a barn and a warehouse and wells and put out an orchard.

Q. How many acres of orchard did you put out?

A. There was about thirty acres in prunes and about ten acres—I think it was all cherries and *pairs*, and then I had a little orchard outside of that, two or—acres right near the house, a much older orchard.

Q. About what was the value of the improvements; how much money did you expend for instance in buildings on that property while you lived there?

A. It is pretty hard for me to get at that in so many years but I would say ten thousand dollars any way, in wells, and pumping plants and orchards and such things as that, and fences.

Q. Describe your dwelling house on the land?

A. The dwelling house was about six or seven room house two stories, and then the barn was quite a big barn, fifty or sixty feet long I think, and then there are out-houses, quite a lot of out-houses.

Q. At the time you lived on and held these lands under the title you received from the State, did you believe that you was
27 the sole and only owner of all of the property included in these deeds?

A. I surely did I had a deed from the State, and I supposed that was all right.

Q. You were holding it and occupying it adversely to all the world in the honest belief that you were the sold and only owner of it?

A. I surely was.

Q. You did that up to the time you conveyed to McComas?

A. Yes, sir; And I could have as well—and Mr. McComas, when he bought it, he thought the title was all right, but he thought he might as well have a warranty deed from me.

Q. Do you know who has been occupying the land since you sold to Mr. McComas?

A. He has had different men, but I can't tell who has been on it since I sold it.

Q. What improvements do you know of being made on the land?

A. There has never been a great deal of improvements since McComas had it; he put in about forty acres of alfalfa or fifty acres, and has a pumping plant, an engine one year I know, and he had in fourteen or fifteen acres of potatoes I know.

Q. Prior to the time you sold to Mr. McComas state whether or not you had any knowledge that any one was claiming any part of the lands included in these deeds adversely to you?

A. I had no knowledge of it if they had.

Q. You had no knowledge that the Railway Company had any claim on it?

A. No, sir; not in the least.

28 Cross-examination by Mr. Hart:

Q. Do you know, Mr. Switzler, can you give me the location again, you told where your house was located?

A. I really don't know exactly, it was on I think Section 7, and over on the Columbia River. It seems to me it was somewhere in about here. (Indicating on plat.)

Q. That is the North half of the Northeast Quarter of Section 7?

A. I kind of think that is it, but I don't know the exact location because I never had that surveyed, because I supposed I owned it all and it didn't make any difference.

Q. Was the whole island improved?

A. No, there was a portion of it I used for pasture, and I don't know whether he has plowed that up yet or not; all the lower end of the island we most always used for pasture, and this end of the island was used mostly for pasture.

Q. Were there fences?

A. Yes, sir; there was a fence across, the Columbia fenced it on one side, and the slo-gh fenced it on the other and then of course all the garden pieces has to be fenced separate you know.

Q. Your garden was around the house?

A. Yes, sir; and then the orchard had to be fenced off separate too.

Q. And that orchard was near the house?

A. Yes, sir; right opposite the house.

Q. How about the upper end?

A. The upper end was all put in alfalfa and potatoes. McComas had quite a lot of potatoes in there one year, I don't know how many, but he had quite a patch of potatoes in there and pumped water for it.

29 Q. About how long since you sold to McComas?

A. About eight or ten years since I sold to McComas.

Q. How close to the river was your house?

A. I suppose it was in low water, it was possibly one hundred

yards in the low water season to the river, but in high water it was right up in the house.

Q. That house was built how many years ago?

A. Some years after I went there we built a new house and tore the old one down.

Q. Do you remember whether that was the house and barn located on section six?

A. No, I think it was in section seven, but I am not sure about that.

Q. It may have been on either section six or seven?

A. Yes, sir, I think so, but I am not right sure about that.

Redirect examination:

Q. Do you know whether or not the deeds to you and your wife and daughter included all the land on the Switzler Island?

A. Yes, all of it; no, there was a little piece down at the lower end of the island that the deeds didn't cover, come to think of it, and McComas bought that afterwards.

30 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, et al.,
Defendants.

Stipulation.

The parties hereto stipulate that the foregoing is a true and correct record of the testimony and proceedings taken and had in the foregoing action on the 7th day of December, 1915.

(Sd.)

RALEY & RALEY,
Attorneys for Plaintiff.
CAREY & KERR &
CHARLES A. HART,
Attorneys for Defendants.

And based upon said stipulation and agreement, and the record, evidence and testimony in this case, the Court further finds as follows:

II.

That plaintiff withdraws his claim made in the complaint as to Lot 1 of Section 5, Township 5 North, of Range 30 East.

III.

Plaintiff withdraws his claim to the Northwest Quarter of the Southeast Quarter, and the Southwest Quarter of the Southwest

Quarter, and the Southeast Quarter of the Southwest Quarter of Section 7, Township 5 North, of Range 30 East.

31

IV.

The plaintiff withdraws his claim to the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 8, Township 5, North of Range 30 East.

V.

That the defendants disclaim any interest in and to the South Half of the Northeast Quarter, and the South Half of the Northwest Quarter, and the Northwest Quarter of the Southwest Quarter of Section 7, Township 5 North, Range 30 East W. M.

VI.

That the lands remaining in controversy and involved in this suit are Lots 2 and 4 of Section 5, and the North half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, Township 5 North, of Range 30 East W. M.

VII.

That the State of Oregon filed a Swamp Land Selection List under date of November 23, 1872, for the lands in controversy under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860, and that no action had been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

VIII.

That with the exception of the filing of the Swamp Land List on November 23, 1872, neither the State of Oregon nor any one else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for said lands, or any part thereof.

32

IX.

That the lands in controversy are all within the forty mile place limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City.

X.

That the line of definite location for said branch line of the Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States

under the terms of the Granting Act of July 2d, 1864, on the 29th day of June, 1883.

XI.

That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto by deeds from the State of Oregon bearing dates respectively of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid.

XII.

That while so holding and claiming said lands under color of title as aforesaid, the grantors of the plaintiff expended a large sum of money, to-wit: approximately the sum of \$10,000 upon said lands in the erection of buildings, planting out of orchards, building fences and general farm improvements, and the plaintiff is now the owner and holder of such color or title and improvements by and throuse mesne conveyances thereto.

XIII.

33 That no patent or other conveyance was ever issued by the United States to the State of Oregon for any of the lands in controversy.

XIV.

That on the 31st day of December, 1907, the United States issued its patent to the defendant for Lots 1 and 2 of Section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the Northeast Quarter of the Southwest Quarter of said Section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for Lot 2 as place lands, under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant.

XV.

And the Court further finds that the defendant, the Northern Pacific Railway Company, is now and was at all the times mentioned in the complaint, a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owing

and operating a railway line and owning lands connected therewith in the State of Oregon.

XVI.

That the Farmers Loan and Trust Company, Trustee, is and was at all the times herein mentioned a corporation, duly incorporated, organized and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

XVII.

That the lands in controversy, as hereinbefore described, are not now and never have been in the possession of any person or persons excepting the plaintiff and his grantors by mesne conveyances.

34

XVIII.

The Court further finds that Lot 4 of Section 5, in Township 5, North, of Range 30 East W. M. was not public lands of the United States on the 11th day of October, 1921, and that such lot never has been public lands of the United States since the 29th day of June, 1883.

XIX.

That the North Half of the Northeast Quarter of Section 7, in Township 5, North, Range 30 East W. M., was not public lands of the United States on the 23d day of July, 1908, and never have been such public lands since the 29th day of June, 1883.

XX.

That on the 4th day of December, 1912, the defendant attempted to reconvey the lands in controversy to the United States, and to that end did make, execute and deliver a quit-claim deed therefor, and the court further finds that such quit-claim deed was without force or effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

XXI.

That the equities are all with the plaintiff and against the defendant.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

And based upon the foregoing Findings of Fact, the Court makes finds and files the following

Conclusions of Law.

That the defendant has good and valid claim to Lot 1 of Section 5, and the Northwest Quarter of the Southeast Quarter, and the Southwest Quarter of the Southwest Quarter, and the Southeast Quarter of the Southwest Quarter of Section 7 and the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 8, all in Township 5 North, Range 30 East of the Willamette Meridian and the plaintiff has no claim or interest or estate in or to any part of said property.

II.

That the plaintiff is the owner of the South Half of the Northeast Quarter, and the South half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 7, in Township 5, North, Range 30 East of the Willamette Meridian, and that the defendant has no interest or claim or estate in and to the said lands or any part thereof.

III.

That Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, Township 5, North, of Range 30 East W. M., are odd numbered sections within the forty mile place limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City, by reason of the terms of the Granting Act of July 2, 1864, and that ever since the 29th day of June, 1883, the legal title to said property, and each and every part of it, has been in the Northern Pacific Railway Company.

IV.

That the plaintiff and his grantors and predecessors in interest have acquired title to the said lots 2 and 4 of section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of section 7, in Township 5 North, of Range 30 East W. M., by adverse possession and occupancy under color of title, and the plaintiff is now the sole and only owner of said lands, and of each and every part thereof.

36

V.

That neither the defendants nor any of them, nor any person claiming by, through or under them or any of them now have or are entitled to have or claim any interest in said tracts of land, or any part thereof.

VI.

That the deed from the defendants to the United States was without effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

VII.

That the defendants acquired no interest or estate in said lands, or any part thereof, by reason of any filings, claims or patents acquired from the United States thereto subsequent to said deed.

VIII.

That the plaintiff is entitled to decree quieting his title to the lands in controversy.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

Filed Apr. 7, 1916.

FRANK SALING, *Clerk.*

By MURIEL SALING, *Deputy.*

37 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Objections of Defendants to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

Now come the defendants and make the following objections to plaintiff's proposed findings of fact and conclusions of law:

Defendants object to findings of fact numbered VIII for the reason that there is no evidence in the record to sustain any such finding. The record does not show what, if any, steps were taken by the State of Oregon after filing of its list on November 23, 1872, in the effort to perfect title to the lands described in said list, but some of the lands included in said list and included in this complaint as to which defendants have disclaimed were in fact subsequently patented to the State of Oregon as a result of their being so listed.

Defendants object to findings numbered XVIII and XIX upon the ground that the evidence herein does not warrant a finding that the lands therein described were not the public lands of the United

States on October 11, 1912, and were not such public lands since June 29, 1883.

38 & 39 Defendants object to finding numbered XX upon the ground that the record herein does not warrant a finding to the effect that the quitclaims executed by defendant, Northern Pacific Company, to the United States were without force or effect to restore the lands deeded to the public domain of the United States.

Defendants object to proposed conclusions of law numbered III, IV, V, VI, VII, and VIII upon the ground that the evidence herein and the facts proven thereby do not justify the conclusions of law so proposed.

Defendants further object to said conclusions of law upon the ground that under and by virtue of the provisions of the Act of Congress of July 2, 1864, said lands in controversy, to-wit:

Lots 2 and 4 of section 5; north half of northeast quarter, lots 1 and 2 and northeast quarter of southwest quarter of section 7, all in township 5 north of range 30 east of Willamette Meridian.

were not on June 29, 1883, when map of definite location of the railway of the defendant, Northern Pacific Railway Company, from Ainsworth to Yakima City was filed, public lands free from any claim within the meaning of said Act, and therefore did not pass to or become the property of defendant, Northern Pacific Railway Company, at the time and because of the filing of said map of definite location on June 29, 1883; and therefore that plaintiff and his predecessors have not acquired any rights to said lands by virtue of possession.

Dated this 6th day of April, 1916.

CAREY & KERR, &
C. A. HART,
Attorneys for Defendants.

40 Be it remembered, That at a regular term of the Circuit Court of the State of Oregon for the county of Umatilla, begun and held in the County Court House in Pendleton, in said County and State, on Monday the 10th day of January, A. D. 1916, the same being the second Monday in said month, and the time fixed by law for holding a regular term of said court.

Present: Gilbert W. Phelps, Judge Presiding.

Whereupon, a term of said Court is begun and holden on Friday, the 7th day of April A. D. 1916, the same being the Fifty-fifth judicial day of said Court; and, among other proceedings, the following were had, to-wit:

E. W. McCOMAS, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Trustee, and
Other Persons Unknown to Plaintiff, Defendants.

Decree.

This cause having been heretofore tried in open Court, the plaintiff appearing by Raley & Raley, his attorneys, and the defendants appearing by Carey & Kerr and C. A. Hart, their Attorneys; and the Court having listened to the arguments and considered the evidence in said cause, and being fully advised and having heretofore made and signed and caused to be filed herein its Findings of Fact and Conclusions of law, and being now advised in the premises and advised as to what decree the Court ought to render in said cause,

It is now considered, ordered adjudged and decreed that the defendant the Northern Pacific Railway Company has valid claim to Lot 1 of Section 5, and the Northwest Quarter of the Southeast Quarter and the Southwest Quarter of the Southwest Quarter, 41 and the Southeast Quarter of the Southwest Quarter of Section 7, and the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 8, all in Township 5 North, of Range 30 East of the Willamette Meridian, and that the plaintiff has no claim or interest or estate in or to any part of said last above described property.

And it is further considered, ordered, adjudged and decreed that the plaintiff is the owner of the South Half of the Northeast Quarter, and the South Half of the Northwest quarter, and the Northwest Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, and that the defendant has no interest or claim or estate in or to the said lands or any part thereof.

And it is further considered, ordered, adjudged and decreed, that the plaintiff, E. W. McComas, is the owner of and is in possession of and entitled to the possession of Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2 and the Northeast Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, and that neither the defendants nor any of them, nor any person claiming by, through or under them or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the title of plaintiff E. W. McComas in and to Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, be and the same hereby is forever decreed to be quieted and freed from all claims of every kind and character in any manner asserted

or claimed to be asserted by the defendants or either or any of them.

42 And it is further considered, ordered, adjudged and decreed that plaintiff have and recover of and from the defendant the Northern Pacific Railway Company his costs and disbursements in this suit, taxed at \$38.65 and that execution issue to enforce this decree.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

43 & 44 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Notice of Appeal.

To E. W. McComas and to Messrs. Raley & Raley, his Attorneys:

You and each of you are hereby notified that the defendants Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, and each of them, hereby appeal to the Supreme Court of the State of Oregon from each and every part and the whole of that certain decree rendered and entered against the defendants in the above entitled suit in the Circuit Court of the State of Oregon for Umatilla County on the 7th day of April, 1916, which decree quiets and frees from all claims of every kind and character the title of plaintiff in and to certain of the lands described in this suit, and further adjudges that plaintiff recover of defendant Northern Pacific Railway Company costs and disbursements taxed herein in the sum of thirty-eight and sixty-five hundredths dollars (\$38.65).

CAREY & KERR &
C. A. HART,

*Attorneys for Defendants Northern Pacific
Railway Company and The Farmers
Loan and Trust Company, Trustee.*

45 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Undertaking on Appeal.

Whereas the defendants, Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, have appealed to the Supreme Court of the State of Oregon from a decree made and entered against them in the above entitled cause in said Circuit Court in favor of plaintiff therein and against the defendants on the 7th day of April, 1916, which decree quieted and freed from all claims of every kind and character the title of plaintiff to certain of the lands described in the complaint herein and adjudged that plaintiff recover of the defendant Northern Pacific Railway Company costs and disbursements taxed herein in the sum of thirty-eight and sixty-five hundredth dollars (\$38.65);

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, as principals, and National Surety Company, a corporation organized and existing under the laws of the State of New York, having an office in Portland, Oregon, and being duly authorized to transact business within the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of said defendants and appellants that said defendants and appellants will pay to the plaintiff all damages, costs, and disbursements which may be awarded against them on the appeal.

NORTHERN PACIFIC RAILWAY COMPANY AND

THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE,

By CAREY & KERR &
C. A. HART,

Their Attorneys.

NATIONAL SURETY COMPANY,

By MARC HUBBERT,

Resident Vice President.

[SEAL.]

Attest:

M. H. CROWE,

Resident Ass't Sec'y.

Countersigned at Portland, Ore., April 25th, 1916.

NATIONAL SURETY COMPANY,

By MARC RUBBERT,

Resident Agent.

47 STATE OF OREGON,
County of Umatilla, ss:

I, Frank Saling, County Clerk of Umatilla County, State of Oregon, and ex-officio Clerk of the Circuit Court of said County and State do hereby certify that the foregoing copies of Complaint, Answer, Reply, Opinion, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal and Undertaking on Appeal in the case of E. W. McComas, Plaintiff vs. Northern Pacific Railway Company, a Corporation, The Farmers Loan and Trust Company, a Corporation, Trustee, and other persons unknown to plaintiff, Defendants, have been by me compared with the originals and that they are true and correct transcripts therefrom, and of the whole of each original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 3d day of May, A. D. 1916.

[Seal of the Circuit Court, Umatilla Co.]

FRANK SALING, *Clerk*,
By MURIEL SALING, *Deputy*.

48 In the Supreme Court of the State of Oregon, May Term,
1916.

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE FARMERS' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from the Decree of the Circuit Court for Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Appellants' Abstract of Record.

Raley and Raley, Attorneys for Respondent.

Carey and Kerr, and Charles A. Hart, Attorneys for Appellants.

Filed May 25, 1916, J. C. Moreland, Clerk, by Lee Moorhouse, Deputy.

48½ STATE OF OREGON,
County of Umatilla, ss:

Due service of the within abstract of record is hereby accepted in Umatilla County Oregon, this 25 day of May, 1916, by receiving a copy thereof duly certified to as such by Charles A. Hart of attorneys for appellant.

J. H. RALEY,
Attorney for Respondent.

49 In the Supreme Court of the State of Oregon, May Term,
1916.

E. W. McCOMAS, Respondent,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE FARM-
ers' Loan and Trust Company, a Corporation, Trustee, and Other
Persons Unknown to Plaintiff, Appellants.

Appeal from the Decree of the Circuit Court for Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Appellants' Abstract of Record.

This action was begun by the filing by plaintiff in the Circuit
Court for Umatilla County on the 25th day of September, 1912, of
the following Complaint:

Complaint.

The plaintiff for cause of suit against the above-named defendants
alleges:

50

I.

That the Northern Pacific Railway Company is now, and was at
all times mentioned in this complaint, a corporation duly incor-
porated, organized and doing business under the laws of the State of
Wisconsin, owning and operating a railroad line and owning lands
connected therewith in the State of Oregon.

II.

That the Farmers' Loan & Trust Company, Trustee, is and was at
all times herein mentioned, a corporation duly incorporated, organ-
ized and doing business in the State of New York and State of Oregon,
under and by virtue of the laws of the State of New York.

III.

That the plaintiff is now the owner in fee and in possession of the
following described lands situated in Umatilla County, State of Ore-
gon, to-wit: Lots one (1), two (2) and four (4), in section five (5),
township five (5) north, range thirty (30) east of the Willamette
Meridian; the northeast quarter ($NE\frac{1}{4}$), the northwest quarter
($NW\frac{1}{4}$), the north half of the southwest quarter ($N\frac{1}{2} SW\frac{1}{4}$); the
northwest quarter of the southeast quarter ($NW\frac{1}{4} SE\frac{1}{4}$); the south-
west quarter of the southwest quarter ($SW\frac{1}{4} SW\frac{1}{4}$), and the south-
east quarter of the southwest quarter ($SE\frac{1}{4} SW\frac{1}{4}$) of section seven

51 (7), township five (5) north, range thirty (30) east of the Willamette Meridian; and the northwest quarter of the northeast quarter ($NW\frac{1}{4}$ $NE\frac{1}{4}$), and the northeast quarter ($NE\frac{1}{4}$) of the northwest quarter ($NW\frac{1}{4}$) of section 8, township five (5) north, range thirty (30) east, Willamette Meridian; and the said above described lands are not in the possession of any other person or persons.

IV.

That the plaintiff and his grantors have been the owner in fee and in possession of the said lands under a claim of right, title and interest and color or title thereto for more than ten (10) years prior to the commencement of this suit, adversely to the defendants herein and all the world.

V.

That the defendants and each of them and other persons unknown to the plaintiff claim to have some right, title or interest in the said lands adverse to the plaintiff.

Wherefore, the plaintiff prays for a decree of this court quieting his title thereto, and declaring the plaintiff to be the owner in fee of said lands; and that the plaintiff have judgment against the defendants herein for his costs and disbursements in this suit; and for such other and further relief as may be equitable.

On the 30th day of November, 1912, the defendants served and filed the following answer:

52

Answer.

Now comes the defendants, Northern Pacific Railway Company and The Farmers' Loan and Trust Company, and make this their answer to the complaint herein.

These defendants admit the allegations of paragraphs I and II of the complaint with reference to the organization and business of these defendants.

These defendants deny that plaintiff is the owner in fee and in possession of the lands described in the complaint, except that defendants admit that plaintiff is the owner and in possession of the south half of northeast quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$), south half of northwest quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) and northwest quarter of southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$), section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian.

These defendants deny that plaintiff and his grantors have been the owners in fee and in possession of the land described in the complaint under a claim of right, title and interest and color of title thereto for ten years prior to the commencement of this suit, adversely to these defendants and to all the world.

These defendants admit that the defendant Northern Pacific Railway Company claims to be the owner in fee of, and the defendant

53 The Farmers' Loan and Trust Company claims to have an interest in, all of the lands described in the complaint, excepting said south half of northeast quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$), south half of northwest quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) and northwest quarter of southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$), section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian, hereinabove referred to, and excepting lot four (4), in section five (5), the north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7), and the northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$), of section eight (8), all in township five (5) north of range thirty (30) east of the Willamette Meridian.

And the defendants make the following further and separate answer to the complaint herein:

On or about December 31, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent said lot one (1) of section five (5), in township five (5) north of range thirty (30) east of the Willamette Meridian; on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent lot two (2) of said section five (5); on or about November 25, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent north half of northwest quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$), also known as lots one 54 (1) and two (2) of section seven (7), in said township and range; on or about June 8, 1906, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northeast quarter of southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of said section seven (7); and on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northwest quarter of southeast quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$), southwest quarter of southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) and southeast quarter of southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) of said section seven (7). These defendants allege that by virtue of the title so conveyed by said patents of the United States the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of the lands so conveyed by said patents, and the defendant The Farmers' Loan and Trust Company has a lien thereon under and by virtue of a mortgage or deed of trust made and executed by the defendant Northern Pacific Railway Company. Each and all of said patents so conveying the land to the defendant Northern Pacific Railway Company were issued by the proper officers of the United States under an Act of Congress of the United States, approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph lines from Lake Superior to Puget Sound, on the Pacific Coast by the Northern route."

For their further and separate answer to the complaint 55 herein, these defendants allege that on and prior to October 11, 1912, said lot four (4) of section five (5), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land

Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in conformity with the laws of the United States of said lot four (4); said selection list was duly approved by the local land office of the United States, and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said lot four (4).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to the 23d day of July, 1908, said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in conformity with the laws of the United States of said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said north half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section seven (7).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to March 19, 1908, said northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on that day the United States conveyed the said tracts by patents duly and lawfully issued to the defendant Northern Pacific Railway Company. Thereafter and prior to the commencement of this suit, the defendant Northern Pacific Railway Company conveyed the said tracts to Joseph C. Scott, and as these defendants are informed and believe, said Joseph C. Scott is still the owner in fee of said tracts. The said Joseph C. Scott, as these defendants are informed and believe, is still living and this suit as to the said northwest quarter of northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) and northeast quarter of northwest quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of section eight (8), cannot properly proceed to a determination without the presence as a party thereto of the said Joseph C. Scott.

Wherefore, these defendants pray that this court adjudge and decree that the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of said lots one (1) and (2) of section five (5), north half of northwest quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) of section seven (7), northeast quarter of southwest quarter

(NE $\frac{1}{4}$ of SW $\frac{1}{4}$) of section seven (7) and northwest quarter of southeast quarter (NW $\frac{1}{4}$ of SE $\frac{1}{4}$), southwest quarter of southwest quarter (SW $\frac{1}{4}$ of SW $\frac{1}{4}$) and southeast quarter of southwest quarter (SE $\frac{1}{4}$ of SW $\frac{1}{4}$) of section seven (7), all in township five (5) north of range thirty (30) east of the Willamette Meridian, and that its title thereto be quieted, save as to the mortgage lien thereon of the defendant The Farmers' Loan and Trust Company, and that the defendant The Farmers' Loan and Trust Company has a lien upon said lands by virtue of a mortgage or deed of trust executed and delivered by the defendant Northern Pacific Railway Company; and that this suit be dismissed as to the said lot four (4) of section five

58 (5), north half of northeast quarter (N $\frac{1}{2}$ of NE $\frac{1}{4}$) of section seven (7), and northwest quarter of northeast quarter (NW $\frac{1}{4}$ of NE $\frac{1}{4}$) and northeast quarter of northwest quarter (NE $\frac{1}{4}$ of NW $\frac{1}{4}$) of section eight (8), in township five (5) north of range thirty (30) east of the Willamette Meridian; that these defendants be given judgment for costs and their disbursements, and be given such other and further relief as may be equitable.

Thereafter and on the 13th day of January, 1913, the plaintiff served and filed the following Reply:

Reply.

Comes now the plaintiff and for reply to the answer filed herein, admits and denies as follows:

I.

For reply to the first further and separate answer, the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

II.

For reply to the second further and separate answer, the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

III.

In reply to the third further and separate answer, plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

59 Wherefore, the plaintiff prays as in the complaint.

Transcript of Testimony and Proceedings.

On the 7th day of December, 1915, said cause was tried to the court without a jury, the following proceedings being had upon the trial:

This cause came on regularly for hearing before the Honorable G. W. Phelps, Circuit Judge of the Sixth Judicial District of the State of Oregon, at Pendleton, Oregon, on the 7th day of December, 1915, plaintiff appearing by his counsel, Messrs. Raley and Raley, and defendants appearing by their counsel, C. A. Hart, Esq. The following proceedings were had, to-wit:

Plaintiff and defendants hereby stipulate that the following statement with reference to the lands described in the complaint may be taken as the facts in this case:

Section 5, Township 5 North or Range 30 East.

Lot One. Plaintiff hereby withdraws the claim made in the complaint as to this lot, and decree may be entered herein confirming defendants' title.

Lot Two. This lot was patented to defendant Railway Company on May 4, 1909, under the terms of the Act of July 2, 1864 (13 Statutes at Large, 365). Previously, however, it had been included in a so-called Swamp Land Selection List filed by the State
60 of Oregon under date of November 23, 1872, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860. The claim of the State of Oregon thus asserted by the filing of this Swamp Land List has never been adjusted. On August 10, 1892, the State of Oregon conveyed this lot to Mary Switzler, and she thereafter conveyed said lot to plaintiff in this case.

On December 4, 1912, defendant Northern Pacific Railway Company, assuming that this lot was excluded from its grant because of the existence at the time of definite location of the Swamp Land claim of the State of Oregon, and that the lot therefore was patented to the Railway Company in error, reconveyed the said lot to the United States by deed dated December 4, 1912, and said reconveyance was duly recorded in the office of the County Clerk of Umatilla County on January 15, 1915, in Volume 82, of Deeds, pages 34 and 35.

Thereafter, and on January 17, 1913, defendant Northern Pacific Railway Company filed in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, selecting lot 2 in lieu of land lost from its grant of July 2, 1864, because of the classification as mineral lands of said lands within the place limits of the grant; and said Northern Pacific Railway Company claims said lot 2 by virtue of said selection list and by virtue of the terms and conditions of the Act of Congress approved July 2, 1864.

61 Lot Four. This lot was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (as described in the next preceding paragraph), and thereafter, to-wit, on August 10, 1892, was conveyed by the State of Oregon to Mary Switzler and by her to the plaintiff herein. Thereafter the swamp land claim thus asserted by the State of Oregon was rejected by the General Land Office of the United States.

Defendant Northern Pacific Railway Company made claim to this lot by the filing of its Mineral Indemnity Selection List No. 101, serial No. 011236, which selection list was approved by the local Land Office of the United States on October 11, 1912; and defendant Railway Company now asserts claim to said lot by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Section 7, Township 5 North of Range 30 East.

The South Half of Northeast Quarter. The defendants in their answer disclaim any interest in this property and now repeat said disclaimer, and the title of the plaintiff in said tract may be confirmed by decree.

The North Half of Northeast Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872, (under Swamp Land Acts of Congress of 1850 and 1860 above referred to). The claim of the state thus asserted was therefore rejected by the General Land Office of the United States. On

62 August 10, 1892, the State of Oregon conveyed the tract to Mary Switzler and John Switzler and by mense conveyances said tract was later conveyed to the plaintiff herein.

Defendant Railway Company made claim to this tract by filing its Mineral Indemnity Selection List No. 67, serial No. 0540, specifying, among other lands, this property, which selection list was approved by the local Land Office of the United States on July 23, 1908; and the defendant Railway Company makes claim to this tract by virtue of the filing of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

South Half of Northwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat their disclaimer, and agree that plaintiff's title thereto may be confirmed by decree.

Lots One and Two (or Fractional North Half of Northwest Quarter). This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Act of Congress hereinabove referred to), not yet adjusted. The tract was conveyed by the State of Oregon to John Switzler on August 10, 1892, and by him through mense conveyances to plaintiff.

This tract was patented to defendant Railway Company on December 31, 1907. The Railway Company assuming that said tract was excluded from its grant because of the existence at the time of definite location of the swamp land claim of the State of Oregon,

63 and assuming that the patent to the Railway Company was erroneous, reconveyed said tract to the United States under date of December 4, 1912, said reconveyance being thereafter duly recorded in the office of the County Clerk of Umatilla County in Volume 82 of Deeds, at pages 34 and 35.

Thereafter defendant Railway Company made claim to this tract by filing in the Local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, dated January 17, 1913, which list specified, among other tracts, this property; and the Railway Company now asserts claim to this tract by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat said disclaimer, and agree that plaintiff's title may be confirmed by decree.

Northeast Quarter of Southwest Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Acts of Congress hereinabove referred to). The claim of the State of Oregon thus asserted was therefore rejected by the General Land Office of the United States. Prior to such rejection, to-wit, March 15, 1895, the State of Oregon conveyed said tract to Delia Switzler and through *mense* conveyances the tract was thereafter conveyed to plaintiff herein.

This tract was originally patented to the defendant Railway Company on June 8, 1906, under the terms of the Granting Act
64 of July 2, 1864 (13 Statutes at Large, 365). Defendant Railway Company assuming that said tract was excluded from its grant because of the existence of the swamp land claim of the State of Oregon at the time of definite location, reconveyed said tract to the United States on December 4, 1912, said reconveyance being duly recorded in the office of the County Recorder of Umatilla County in Book 82 of Deeds, at pages 34 and 35.

Thereafter defendant Railway Company filed in the Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 106, which list specified this tract, and said selection list was on January 17, 1913, duly approved. Based upon the selection so made by the Railway Company, the tract was, on May 25, 1914, patented to the defendant Railway Company, said patent being duly recorded in the office of the County Recorder of Umatilla County, in Book 89 of Deeds, at page 99. The Railway Company now asserts claim to said lot by virtue of said patent and by virtue of the rights given it by Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter; Southwest Quarter of Southwest Quarter; Southeast Quarter of Southwest Quarter. This land was patented to the defendant Railway Company on May 4, 1909. Plaintiff withdraws the claim made to it in the complaint herein and agrees that defendants' title thereto may be confirmed.

65 Section 8, Township 5 North of Range 30 East.

Northwest Quarter of Northeast Quarter; Northeast Quarter of Northwest Quarter. The plaintiff now withdraws the claim made

in the complaint as to this land and agrees that defendants' title thereto may be confirmed by decree.

All of the lands in controversy in this suit are within the forty-mile place limits of the branch line of the Northern Pacific Railway Company constructed from Ainsworth to Yakima City. The line of definite location for said branch line of Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864 (13 Statutes at Large, 365), on the 29th day of June, 1883; that no action has been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

John B. Switzler, being called and sworn as a witness on the part of plaintiff, testified as follows:

(Here follows plaintiff's proof of possession):

Thereafter and on the 28th day of March, 1916, the court made and filed the following Opinion herein:

Opinion.

66 Passing preliminary statements, there being no disagreement as to facts, and without a detailed discussion of the law or of the numerous cases cited by one side or the other, I will state briefly the conclusion reached after a very careful examination of the authorities cited, and a very careful consideration of the respective briefs.

It is conceded that the lands in controversy passed to the Northern Pacific Railroad Company immediately upon the filing by said company of its map of definite location on June 29, 1883, unless at that time the said lands were not free from "pre-emption or other claims or rights."

It is the contention of defendant that the Swamp Land Selection List of the State of Oregon was at the time of the filing of the map of definite location a "claim" against the land which would exempt same from the grant to the Railroad Company.

If this contention be upheld, then it follows as a matter of course that the lands remained public lands, and title did not pass to plaintiff or his predecessors by adverse possession. Otherwise title did pass.

In the case of *Pengra v. Munz*, 29 Fed. 830, it is held by Judge Deady in effect that the failure of the proper state officials to file a list of the lands selected under the Swamp Land Act prior to the year 1872 was relinquishment of any right or claim the state might have as against the lands.

67 This decision is severely criticised by counsel for defendant, and it is strongly urged that it should not be followed. The case of *Gaston v. Stott*, 5 Ore. 48, is cited as holding a contrary doctrine, but the point of importance in that case was as to whether or not the grant was one in praesenti, and the opinion of Justice McArthur was later expressly overruled in the cases of *Small v. Lutz*, 41 Ore. 577, and *Morrow v. Warner Valley Stock Co.*, 56 Ore. 329.

These last-mentioned cases having been decided after the Supreme Court of the United States had passed upon the subject in the cases of *Michigan L. & L. Co. v. Rust*, 168 U. S. 589, and *Brown v. Hitchcock*, 173 U. S. 473.

However, *Gaston v. Stott*, if authority to be recognized for any purpose, after being overruled as mentioned, holds that the state did not lose its rights because its officers did not act more promptly.

This contention is supported by later authorities, as cited by counsel for defendants, and while there is to be found both law and basis for argument on each side of the question, it seems to me that defendants' position as to this question must ultimately prevail whenever the higher courts are called upon to decide.

It is not so clear, however, that subordinate state courts should not follow the case of *Pengra v. Munz* supra, until the question is finally settled by the appellate courts upon the particular question raised here. A federal question is involved, and while, indeed, the state courts are only bound by the ruling of the Supreme Court of the United States, yet there should be manifest error before the refusal to follow the United States District Court upon a federal question.

But assuming that the state forfeited no rights by its failure to act more promptly, there still remains what seems to me to be, in its final analysis, the real question in the case, and that is what was meant by the words, "free from pre-emption or other claims or rights" in the Act of July 2, 1864?

It is plaintiff's contention that these words referred only to claims of record or to those recognized officially by some officer of the government. He cites the case of *N. P. R. R. Co. v. Coleburn*, 164 U. S. 383. In this case it is held that the claim or right need not necessarily be one of record, but that it must be a bona fide claim, and such as indicates an intention to perfect the claim.

When analyzed, there is no inconsistency in the several decisions urged upon the court by both parties to this suit.

But there is to be found in all of the decisions upon the subject an evident purpose to say that it is not every claim that answers the requirements of the law so as to prevent the passing of title under the particular grant then being considered.

It is settled beyond controversy that the claim need not be one of record, but it seems to me to be equally well settled that where under a given state of facts a court of equity should say that a party is guilty of laches in not pursuing a claim or demand, then, as a matter of law, by non-action the claim, though sufficient at one time, becomes insufficient when it is allowed to become stale. And while it may be assumed that the filing of the Swamp Land List in 1872 constituted a claim sufficient at the time to withhold the selections from passing had the map of definite location been then or within a reasonable time thereafter filed by the Railroad Company, yet it by no means follows that such would be the legal effect for all future time.

It seems to me that the court should look to the conditions existing in the year 1883, and from all the facts and circumstances say

whether at that time there was a "claim" within the contemplation of the law.

The question is not easy of solution, but it is my opinion that if the State of Oregon ever had a valid claim against this land, there had been no act to indicate at the time of the definite location that the state was still claiming this land under the Swamp Land Act or otherwise. In fact, it would seem that there had been a complete abandonment of any claims the state theretofore had, and this conclusion is backed up by the subsequent acts of both the state and the United States, when patents passed to the defendant. It would also seem that defendants' act in first accepting the patents and then undertaking to reconvey to the government was done to prepare for this particular case.

Upon the case as a whole, I am of the opinion that even though the state's claim was filed within the time limit, and at the time constituted a "claim" within the meaning of the Act of 1864, and within the construction of the word as found in the decisions cited, yet by the same authorities the claim made by the state in 1872 would not be recognized by the courts as a claim in 1883 sufficient to exclude the lands from the grant to the defendants.

It follows under the evidence that plaintiff and his predecessors obtained title by adverse possession, and finding will be made accordingly.

On the 7th day of April, 1916, the court made and entered the following Findings of Fact and Conclusions of Law:

Findings of Fact and Conclusions of Law.

This matter coming on now for consideration by the court, the plaintiff having heretofore appeared in this cause by Messrs. Raley and Raley, his attorneys, and the defendants appearing herein by their counsel, Carey and Kerr and C. A. Hart, Esq., and the court having heretofore taken and heard such testimony as each of the parties hereto had to offer in said cause, and having listened to arguments and duly considered the briefs of both plaintiff and defendants, and being advised upon the record, the evidence and testimony in said cause, now makes, finds and files the following:

Findings of Fact.

I.

That the plaintiff and defendants, through their respective counsel, have filed a stipulation in this cause, in words and figures as follows:

(Here follows facts as stipulated and as shown in Transcript.)

And based upon said stipulation and agreement and the record, evidence and testimony in this case, the court further finds as follows:

II.

That plaintiff withdraws his claim made in the complaint as to lot 1 of section 5, township 5 north of range 30 east.

III.

Plaintiff withdraws his claim to the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter of section 7, township 5 north of range 30 east.

IV.

The plaintiff withdraws his claim to the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, township 5 north of range 30 east.

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V.

That the defendants disclaim any interest in and to the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, township 5 north, range 30 east, W. M.

VI.

That the lands remaining in controversy and involved in this suit are lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, township 5 north of range 30 east, W. M.

VII.

That the State of Oregon filed a Swamp Land Selection List under date of November 23, 1872, for the lands in controversy, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860, and that no action had been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

VIII.

That with the exception of the filing of the Swamp Land List on November 23, 1872, neither the State of Oregon nor any one else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for said lands, or any part thereof.

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IX.

That the lands in controversy are all within the forty-mile place

limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City.

X.

That the line of definite location for said branch line of the Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864, on the 29th day of June, 1883.

XI.

That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto, by deeds from the State of Oregon bearing dates, respectively, of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid.

XII.

That while so holding and claiming said lands under color of title as aforesaid, the grantors of the plaintiff expended a large
74 sum of money, to-wit, approximately the sum of \$10,000, upon said lands in the erection of buildings, planting out of orchards, building fences and general farm improvements, and the plaintiff is now the owner and holder of such color of title and improvements, by and through mesne conveyances thereto.

XIII.

That no patent or other conveyance was ever issued by the United States to the State of Oregon for any of the lands in controversy.

XIV.

That on the 31st day of December, 1907, the United States issued its patent to the defendant for lots 1 and 2 of section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the northeast quarter of the southwest quarter of said section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for lot 2 as place lands under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant.

XV.

And the court further finds that the defendant the Northern Pacific Railway Company is now and was at all the times mentioned in the complaint a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owning and operating a railway line and owning lands connected therewith in the State of Oregon.

XVI.

That the Farmers' Loan and Trust Company, Trustee, is and was at all the times herein mentioned a corporation, duly incorporated, organized and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

XVII.

That the lands in controversy, as hereinbefore described, are not now and never have been in the possession of any person or persons excepting the plaintiff and his grantors by mesne conveyances.

XVIII.

The court further finds that lot 4 of section 5, in township 5 north of range 30 east, W. M., was not public lands of the United States on the 11th day of October, 1912, and that such lot never has been public lands of the United States since the 29th day of June, 1883.

XIX.

That the north half of the northeast quarter of section 7, in township 5 north, range 30 east, W. M., was not public lands of the United States on the 23d day of July, 1908, and never have been such public lands since the 29th day of June, 1883.

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XX.

That on the 4th day of December, 1912, the defendant attempted to reconvey the lands in controversy to the United States, and to that end did make, execute and deliver a quitclaim deed therefor, and the court further finds that such quitclaim deed was without force or effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

XXI.

That the equities are all with the plaintiff and against the defendants.

And based upon the foregoing Findings of Fact, the court makes, finds and files the following

Conclusions of Law.

I.

That the defendant has good and valid claim to lot 1 of section 5, and the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter, of section 7, and the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, all in township 5 north, range 30 east of the Willamette Meridian, and the plaintiff has no claim or interest or estate in or to any part of said property.

II.

77 That the plaintiff is the owner of the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, in township 5 north, range 30 east of the Willamette Meridian, and that the defendant has no interest or claim or estate in and to the said lands or any part thereof.

III.

That lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, township 5 north of range 30 east, W. M., are odd-numbered sections within the forty-mile place limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City, by reason of the terms of the Granting Act of July 2, 1864, and that ever since the 29th day of June, 1883, the legal title to said property, and each and every part of it, has been in the Northern Pacific Railway Company.

IV.

That the plaintiff and his grantors and predecessors in interest have acquired title to the said lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east, W. M., by adverse possession and occupancy under color of title, and the plaintiff is now the sole and only owner of said lands, and of each and every part thereof.

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V.

That neither the defendants nor any of them, nor any person claiming by, through or under them or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

VI.

That the deed from the defendants to the United States was without effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

VII.

That the defendants acquired no interest or estate in said lands, or any part thereof, by reason of any filings, claims or patents acquired from the United States thereto subsequent to said deed.

VIII.

That the plaintiff is entitled to decree quieting his title to the lands in controversy.

Thereafter defendants duly served and filed their objections to plaintiff's proposed Findings of Fact and Conclusions of Law as follows:

Objections of Defendants to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

Now comes defendants and make the following objections to plaintiff's proposed Findings of Fact and Conclusions of Law:

79 Defendants object to Finding of Fact numbered VIII, for the reason that there is no evidence in the record to sustain any such finding. The record does not show what, if any, steps were taken by the State of Oregon after the filing of its list on November 23, 1872, in the effort to perfect title to the lands described in said list, but some of the lands included in said list and included in this complaint as to which defendants have disclaimed were in fact subsequently patented to the State of Oregon as a result of their being so listed.

Defendants object to Findings numbered XVIII and XIX, upon the ground that the evidence herein does not warrant a finding that the lands therein described were not the public lands of the United States on October 11, 1912, and were not such public lands since June 29, 1883.

Defendants object to Finding numbered XX, upon the ground that the record herein does not warrant a finding to the effect that the quit claims executed by defendant Northern Pacific Company to the United States were without force or effect to restore the lands deeded to the public domain of the United States.

Defendants object to proposed Conclusions of Law numbered III, IV, V, VI, VII and VIII, upon the ground that the evidence herein and the facts proven thereby do not justify the conclusions of law so proposed.

80 Defendants further object to said Conclusions of Law upon the ground that under and by virtue of the provisions of the Act of Congress of July 2, 1864, said lands in controversy, to-wit, lots 2 and 4 of section 5, north half of northeast quarter, lots 1 and 2 and northeast quarter of southwest quarter of section 7, all in township 5 north of range 30 east of Willamette Meridian, were not, on June 29, 1883, when map of definite location of the railway of the defendant Northern Pacific Railway Company, from Ainsworth to Yakima City, was filed, public lands free from any claim, within the meaning of said act, and therefore did not pass to or become the property of defendant Northern Pacific Railway Company, at the time and because of the filing of said map of definite location on June 29, 1883; and therefore that plaintiff and his predecessors have not acquired any rights to said lands by virtue of possession.

On the 7th day of April, 1916, the court made and entered the following Decree:

Decree.

This cause having been heretofore tried in open court, the plaintiff appearing by Raley and Raley, his attorneys, and the defendants appearing by Carey and Kerr and C. A. Hart, their attorneys; and the court having listened to the arguments and considered the evidence in said cause, and being fully advised, and having heretofore made and signed and caused to be filed herein its Findings
81 of Fact and Conclusions of Law, and being now advised in the premises and advised as to what decree the court ought to render in said cause,

It is now considered, ordered, adjudged and decreed that the defendant the Northern Pacific Railway Company has valid claims to lot 1 of section 5, and the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter of section 7, and the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, all in township 5 north of range 30 east of the Willamette Meridian, and that the plaintiff has no claim or interest or estate in or to any part of said last above described property.

And it is further considered, ordered, adjudged and decreed that the plaintiff is the owner of the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, and that the defendant has no interest or claim or estate in or to the said lands, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the plaintiff E. W. McComas is the owner of and is in possession of and entitled to the possession of lots 2 and 4 of section 5, and the

82 north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, and that neither the defendants, nor any of them, nor any person claiming by, through or under them, or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the title of plaintiff E. W. McComas in and to lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, be and the same hereby is forever decreed to be quieted and freed from all claims of every kind and character in any manner asserted or claimed to be asserted by the defendants, or either or any of them.

And it is further considered, ordered, adjudged and decreed that plaintiff have and recover of and from the defendant the Northern Pacific Railway Company his costs and disbursements in this suit, taxed at \$38.65, and that execution issue to enforce this decree.

Thereafter, and on the 25th day of April, 1916, the defendant appealed from the decree herein to the Supreme Court of the State of Oregon, and on the 25th day of April, 1916, filed its

83

Notice of Appeal.

with proof of due service. And thereafter, within the time provided by law, served its undertaking on appeal, with proof of due service.

Assignments of Error.

I.

The court erred in finding (Finding of Fact VIII) that, with the exception of the filing of the Swamp Land List of November 23, 1872, neither the State of Oregon nor anyone else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for the lands in controversy, or any part thereof.

II.

The court erred in finding and determining (Findings of Fact XVIII and XIX) that lot 4 of section 5, township 5 north, range 30 east, was not public lands of the United States on October 11, 1912, and that said lot has never been public lands of the United States since June 29, 1883; and that the north half of northeast quarter of section 7, township 5 north, range 30 east, was not public lands on July 23, 1908, and never has been such public lands since June 29, 1883.

III.

The court erred in finding and determining (Finding of Fact XX) that the quitclaim deed of defendant Northern Pacific Railway Company, by which certain of the lands in controversy were
84 attempted to be reconveyed to the United States, was without force or effect to restore the lands deeded to the public domain of the United States.

IV.

The court erred in finding and determining (Finding of Fact XXI) that the equities are with the plaintiff and against defendants.

V.

The court erred in concluding (Conclusion of Law III) that lots 2 and 4 of section 5, the north half of northeast quarter, and lots 1 and 2, and northeast quarter of southwest quarter of section 7, under the terms of the Act of Congress approved July 2, 1864, have been the property of the Northern Pacific Railway Company since June 29, 1883.

VI.

The court erred in holding (Conclusion of Law IV) that plaintiff and his grantors and predecessors have acquired title to the property last above described by adverse possession and occupancy under color of title, and that plaintiff is now sole and only owner of said lands.

VII.

The court erred in failing and refusing to find that under the terms of the Act of Congress approved July 2, 1864, granting lands to Northern Pacific Railroad Company, predecessor of defendant Northern Pacific Railway Company, said lands last above described
85 were excepted from the lands granted to said Railroad Company, because of the fact that at the time of the definite location of said railway (June 29, 1883), said lands were included in the list filed with the Land Department of the United States under which list the State of Oregon claimed ownership of said lands under the terms of the Swamp Land Acts of September 28, 1850, and March 12, 1860.

VIII.

The court erred in failing and refusing to hold that said lands last above described did not become the property of the Northern Pacific Railroad Company upon definite location of the railroad of said Railroad Company on June 29, 1883, but remained public lands of the United States under and by virtue of the terms of the Granting Act of July 2, 1864; and in failing and refusing to hold that said lands under the terms of said act of July 2, 1864, remained public lands

until the filing of the Indemnity Selection Lists by defendant Northern Pacific Railway Company less than ten years prior to the commencement of this suit.

IX.

The court erred in failing and refusing to hold that the patents of the United States to defendant Northern Pacific Railway Company covering lots 1 and 2 of section 7, and northeast quarter of southwest quarter of section 7, and lot 2 of section 5, all in township 5 north of range 30 east, did not operate to convey said lands to defendant Railway Company because said lands were under the terms of the act of July 2, 1864, excluded from the lands granted.

X.

The court erred in decreeing that plaintiff is the owner of said lands and in decreeing that his title thereto be quieted.

CAREY AND KERR AND
CHARLES A. HART,
Attorneys for Appellants.

89 In the Supreme Court of the State of Oregon. In Banc.

E. W. McCOMAS, Respondent,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Argued and Submitted Nov. 1, 1916.

J. H. Raley (Raley & Raley, on brief) for Respondent.
Charles A. Hart, (Carey & Kerr on brief) for Appellants.

BURNETT, J.:

Affirmed.

Filed Dec. 19, 1916. J. C. Moreland, Clerk of the Supreme Court
By ———.

90 This is a suit to quiet title to certain lands in Umatilla County. The plaintiff asserts title by prescription. The defendants claim under the act of Congress of July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and

telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route." 13 Stat. At Large, p. 365. From a decree in favor of the plaintiff the defendants appealed.

BURNETT, J.:

Although other lands are included in the complaint the parties stipulated disposing of the title to all except the following: Lots 2 and 4 of section 5, and lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southeast quarter of section 7, all in township 5 north, range 30 east W. M. There is substantially no dispute about the facts in the case. Section 3 of the congressional enactment mentioned reads in part as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in

91 odd numbered sections, nearest to the line of said road may be selected as above provided. * * *

The line of the road was definitely fixed and the plat thereof filed in the office of the commissioner of the general land office June 29, 1883. This act has been construed to operate as a present grant beginning with that date so that co instanti the title of the grantee vested in all lands to which the statute applied. It appears that the Governor of Oregon operating under "An Act to enable the state of Arkansas and other states to reclaim the swamp land within their limits," approved September 28, 1850, and made applicable to the states of Minnesota and Oregon by the act of March 12, 1860, filed with the proper authorities of the general government in 1872 a list of lands including those in controversy which it claimed were swamp lands inuring to the state of Oregon under the acts of Congress last mentioned. On August 10, 1892, and March 15, 1895, the state of Oregon conveyed these lands to the plaintiff's predecessors in interest from whom by

mesne conveyance he deraigns title. The grantee in those deeds at once entered into possession of the realty therein described and they and their successors in interest have continuously maintained that tenure until the present time claiming title, and have made improvements on the premises amounting in value to \$10,000.00 and upwards. As before stated, the plaintiff contends that this constitutes adverse possession under color of title which vests in him the fee simple estate as against the defendants, although, as the fact appears to be as to some of the disputed subdivisions, the swamp land claim of the state of Oregon has never been adjusted while as to others it has been rejected by the officers of the general government. It is

92 agreed that all the realty in question lies within the forty mile place limits of the railway line so that if no claim existed against it at the time the line of the road was definitely fixed it would be among the twenty alternate sections per mile on each side of the designated line of road. The contention of the defendants is that the presence of the state's swamp land list in the proper United States Land Office constituted a claim against the land which took it out of the operation of the grant with the result that the tracts were part of the public domain and not subject to holding by adverse title. Some of this very land was patented to the defendant railway company which assuming that the patent had been issued inadvertently, quitclaimed the property to the United States and then after the commencement of this suit filed in the United States Land Office at La Grande what it termed mineral indemnity selections covering the most of the premises in controversy. The defendants say these selections have been approved and depend upon them for their title to the land.

Conceding, as the precedents seem to hold, that the filing of the swamp land list by the state of Oregon constituted a claim within the meaning of the railway grant excluding the lands from its operation proves too much for the defendants. The plaintiff has clearly established color of title by deed from the state for the very land. He deraigns title from this source which the defendants say took the property out of the operation of the grant. It is beyond question that the property has been in the exclusive possession of the plaintiff and his grantors under this color of title for more than ten years prior to the commencement of the suit.

The authority for filing mineral indemnity selections is found in the provision of the congressional statute "that all mineral lands be and the same are hereby excluded from the operations of this act,

93 and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided,"

that is to say, "no more than ten miles beyond the limits of said alternate section." The indemnity, therefore, must be taken out of unoccupied agricultural lands, but this land has been in fact occupied all this time. Moreover, in *Bardon v. N. P. R. R. Co.*, 145 U. S., 535, 545, the supreme court of the United States, speaking by Mr. Justice Field, in construing this same legislation, said: "Not only does the land once reserved not fall under the grant should the reser-

vation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress."

In *Northern Lumber Co. v. O'Brien*, 204 U. S. 190, the act was again under consideration. A claim to certain lands within the forty mile place limit prescribed by the grant made before the Northern Pacific R. R. Company had filed its map of definite location was found to be ineffectual although an order of the Land Department withdrawing it from the category of public lands had been predicated upon it. Under these conditions Mr. Justice Harlan speaking for the court said: "When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the later grant but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad grant."

If the filing of the swamp land list therefore constituted such a claim as to exclude the land from the operation of the railroad grant the cancellation or rejection of that list would not operate to extend the grant over the disputed tract. In other words, the grant does not purport to affect or attach to any subsequent status of the title. On the other hand if the mere filing of the swamp land list did not affect the title granted in presenti by the congressional
94 enactment the holding of the plaintiff and his grantors has been clearly adverse for sufficient length of time to ripen into a fee simple estate as against the defendants. Still further, under the authority of the *Bardon* case the indemnity selections could not be made from any land except what had always been exempt from any claim excluding it from the provisions of the act in the first place. In default of other legislation the grant embodied in the act of July 2, 1864, attached at the date of the filing of the plat of definite location or never. Whatever the general government afterwards might do towards extinguishing the claim of the state under its swamp land filing or the assertion of title by the plaintiff it would not inure to the benefit of the defendants in the matter of filing indemnity selections. The act evidently applied to virgin public domain and to no other, both in the original taking and in subsequent indemnity selections.

The plaintiff comes within the reason of the rule of *Boe v. Arnold*, 54 Or. 52, 102 Pac. 290, to the effect that one may enter upon public lands and by holding the same adversely to all persons except the government may acquire title thereto as against those other parties. Under the authorities quoted it is clear that the rights of the defendant under the act of July 2, 1864, never attached to this land, and that it had no right to include it subsequently in its indemnity selections. It is also equally plain that as between the parties to this suit the adverse possession of the plaintiff and his grantors for more than ten years has vested the title in the latter as against the company. The decree of the circuit court is affirmed.

95 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of October, 1916.

On this Tuesday the 19th day of December, 1916, the same being the twenty-second judicial day of said term, there were present:

Frank A. Moore, Chief Justice; George H. Burnett, Associate Justice; Robert Eakin, Associate Justice; Thomas A. McBride, Associate Justice; Henry J. Bean, Associate Justice; Henry L. Benson, Associate Justice; Lawrence T. Harris, Associate Justice; J. C. Moreland, Clerk; whereupon, among others, the following proceedings were had:

E. W. McCOMAS, Respondent,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, THE FARMERS' LOAN AND Trust Company, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

In Bank Appeal From Umatilla.

This cause having, at Pendleton on the first day of November, 1916, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds there is Not Error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court having considered the allegations of the parties and the stipulation of facts and testimony produced, together with the findings of fact, conclusions of law and decree of the court below in this cause found, made, rendered and entered finds that said findings of fact are correct and are sustained by the evidence, that the conclusions of law are correctly deduced therefrom,

96 and the decree correctly adjudicates the rights of the parties. It is therefore ordered, adjudged and decreed by the court that the findings of fact, conclusions of law and decree of the court below in this cause so found, made, rendered and entered stand as the findings of fact, conclusions of law and decree of this court in this cause.

And said appellants the Northern Pacific Railway Company and The Farmers' Loan and Trust Company, having given an undertaking on appeal with the National Surety Company as their surety, it is further ordered that respondent recover off and from the appellants and their said surety on appeal his costs and disbursements in the court below to be there taxed, and his costs and disbursements in this court taxed at \$49.00.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken, with directions to enter a decree in accordance herewith.

97 In the Supreme Court of the State of Oregon.

In Banc.

E. W. McCOMAS, Respondent,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, THE Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Petition for Rehearing.

Now come appellants, Northern Pacific Railway Company, a corporation, and The Farmers' Loan and Trust Company, a corporation, Trustee, and make this their petition for a rehearing of this cause.

Appellants seek a rehearing of this cause not for the purpose of renewing the arguments made in their briefs and oral arguments already considered by the court, but solely because the court in deciding the case proceeded under a misapprehension as to the state of the record. As we shall endeavor to point out, the premises upon which the court's conclusion are based find no support in the record, the court having inadvertently mistaken the facts as stipulated in the record by the parties.

The decision of the court is first that the Railway Company's mineral indemnity selections, not being made in the mineral
98 indemnity belt are invalid, and it is said that:

"The defendants say these selections have been approved and depend upon them for their title to the land;"

and second, that the adverse possession of plaintiff and his predecessors, being sufficient as against the Railway Company (Boe v. Arnold, 54 Or. 52), the Railway Company cannot complain.

The court is mistaken in assuming that the Railway Company's mineral indemnity selections have proceeded so far as to give this court any jurisdiction whatsoever over them. With one exception (one tract only having been repatented to the Railway Company), the selections are still before the Department, two of them having been approved by the local land office and two as yet having received no approval whatsoever. This being a suit to quiet title and not a possessory action, this court has no power to pass on the validity of these four selections. The question of whether or not they are valid because placed on lands located in place limits rather than indemnity limits is one for the Department. Thus far the Department has ruled that mineral losses may be made up in place

limits or elsewhere and that it is only general losses (i. e., losses resulting from the exception of place limit lands from the grant because of homestead or other claims) which must be made up in the indemnity limits. The mineral indemnity clause in the granting act is separate from that providing for general indemnity and the Department has taken the position that selections for mineral indemnity may be made within the place limits.

99 However this question may be decided, the point we desire to urge upon the court is that so far as the defendants' mineral indemnity selections here are concerned (excepting the one on which patent has been issued) this court is without jurisdiction. The Railway Company purposes to rely upon these mineral indemnity selections and it is relying upon them before the Land Department of the United States; and its right to have these selections considered by the Department cannot be prejudiced by the decision of this court.

Plaintiff's position, therefore, cannot be strengthened by any supposed weakness of the Railway Company's final claims to the lands. The suit is one brought by McComas to quiet his title and if he does not prove his title, obviously he is not entitled to a decree. This court's decision says that the defendants' attempt to secure the land must fail and therefore the plaintiff having possessed the land to the exclusion of defendants should succeed. But this court cannot so determine the rights of defendants for they are not before it for determination. The Land Department of the United States has already approved one of defendant's five mineral indemnity selections (although the land is within the place limits) and presumably will similarly dispose of the other four selections. Until the Department does so dispose of these four selections, this court cannot determine the question of whether they were properly made. The title to these lands is in the United States and jurisdiction over them is still in the Department.

This court has mistakenly supposed that the title to these lands has passed out of the United States and that the controversy is simply as to which of the parties is now the owner of the lands; and
100 applying the spirit of *Boe v. Arnold*, supra, has upheld plaintiff's prescriptive right. A reference to pages 14, 15, 16, 17, and 18 of the abstract of record will show that this assumption as to the issue before the court is erroneous. One of the tracts (northeast quarter of southwest quarter, section 7, township 5 south of range 30 east) has indeed been repatented and the conclusions of the court, erroneous though we think they may be, are applicable to it; but as to all of the rest of the land, the title is in the United States and this court is without power now to pass upon the title which, if the Department acts favorably on the mineral indemnity selections, the Railway Company will receive from the United States.

The result of the decision, therefore, is to permit McComas to take this land—not from the Railway Company but from the United States—by virtue of his occupancy for the ten year period. The decision seems to concede (page 3) that the State's swamp land list prevented these lands from going to the Railway Company in 1883 under the terms of the granting act; and, if so, they remained public

lands and are still (excepting the repatented tract) public lands. Boe against Arnold, therefore, is inapplicable. Plaintiff and defendant were not during the time of plaintiff's possession attempting to secure the title to the lands from the United States.

If defendants' pending efforts to secure the four tracts through mineral indemnity selections are left out of consideration, as we think they must be left out of consideration, plaintiff's suit to quiet title rests solely upon his possession of what concededly was and is public land. To give effect to that occupancy is not to uphold the spirit of Boe v. Arnold, but it is to take the title from the United States and give it to plaintiff; which under Gibson v. Choteau, 80 U. S. 92 (13 Wall. 92) and many later cases cannot be done.

Under the decisions of the Supreme Court of the United States, the conclusiveness of which the decision of this court (page 3) seems to recognize, this case ultimately must be determined against plaintiff. The suit is his and not that of the defendants and he asks for a confirmation of his alleged title. This title is based on adverse possession. The lands involved are public lands and there is not before the court any other question growing out of the application of the defendants to the Land Department of the United States for these lands. In this situation plaintiff's attempt to secure these public lands from the United States by adverse possession, although successful in this court, cannot succeed in the court which under the laws of the United States is empowered to determine finally the questions involved. And if rehearing be not granted here, the result will be to burden the parties with the expense of the proceedings necessary for a final review of the case; all of which, as defendants think certain, ultimately will fall upon plaintiff.

Respectfully submitted,

CAREY & CAREY AND
CHARLES A. HART,
Attorneys for Appellants.

102 STATE OF OREGON,
County of Marion, ss:

I, Charles A. Hart being duly sworn depose and say that I served the within petition for rehearing on Messrs. Raley & Raley attorneys for respondent in this cause by depositing in the United States mail postage prepaid at Portland, Oregon, addressed to said attorneys at Pendleton, Oregon, on the 8th day of January 1917 a copy of said petition certified to be a correct copy by me as attorney for appellant.

(S'd)

CHARLES A. HART.

Subscribed and sworn to before me this 8th day of January 1917.

[SEAL.]

J. C. MORELAND, *Clerk.*
By ARTHUR S. BENSON, *Deputy.*

[Endorsed:] Copy. No. —. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent, vs. Northern Pacific Railway Company et al., Appellants. Petition for Rehearing. Filed Jan. 8, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Carey & Kerr, and Charles A. Hart, Attorneys for Defendants.

103 In the Supreme Court of the State of Oregon. In Banc.

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Petition for Rehearing.

Comes now the respondent, E. W. McComas, and makes this his petition for a rehearing of this cause and for a more definite decision and interpretation of the language used in the opinion filed herein, in this:

Upon page 3 of said opinion the following language is used:

"Conceding, as the precedent seemed to hold, that the filing of the land list by the State of Oregon constituted a claim within the meaning of the Railroad Grant excluded the land from its operation proves too much for defendant."

The opinion having decided the case upon other grounds, the language used does not decide, and perhaps does not intend to decide definitely as to whether or not such precedents do so hold, and if so, as to whether or not such precedents will be followed in this case.

And again, near the bottom of the last page of said opinion, the following language is used:

"Under the authorities quoted, it is clear that the rights of the defendant under the Act of July 2, 1864, never attached to this land."

104 & 105 It is not made clear whether or not the words "Attached to this land" refers to an attachment under the mineral selections, or whether it is intended to refer to the original grant of lands in place limits.

And in this connection, we again refer to the settled policy of the Interior Department itself, which holds that

"Until particular tracts of Government Land have been surveyed and segregated from the public domain by the approval of the lists and plats thereof by the Secretary of the Interior, the lands remain public lands and are subject to preemption and homestead entries."

In other words, the United States does not recognize any claim as existing upon these lands until the segregation by the Secretary of the Interior, and the State had no claim upon these lands at the time of

the taking effect of the grant of the Northern Pacific Railway upon the lands. We cite

Morrow vs. State of Oregon, 32 L. D., page 54.

State vs. Frakes, 33 L. D., page 101.

Morrow vs. Warner Val. Stock Co., 101 Pac. 171, in Column 2 at page 180.

Respectfully submitted,

RALEY & RALEY,
Attorneys for Respondent.

STATE OF OREGON,

County of Umatilla, ss:

I, the undersigned, one of the Attorneys for the Respondent, do hereby certify that I have prepared the foregoing copy of petition for rehearing and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Dated at Pendleton, Oregon, this 9th day of January, 1917.

J. H. RALEY.

106 In the Supreme Court of the State of Oregon. In Banc.

E. W. McCOMAS, Respondent,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from Umatilla County.

Hon. Gilbert W. Phelps, Judge.

On Petition for Rehearing.

Affirmed December 19, 1916.

Raley & Raley, for respondent.

Charles A. Hart and Carey & Kerr, for appellants.

MOORE, J.:

Modified.

Filed Jan. 30, 1917. J. C. Moreland, Clerk of the Supreme Court.

107 MOORE, J.:

In a petition for a rehearing it is contended that the defendant, the Northern Pacific Railway Company, which will hereafter be

called the company, holds a legal title to only one of the disputed tracts of land, that the United States is vested with such title to the other parcels of the controverted real property, of which latter premises the state courts have no jurisdiction, and that this being so an error was committed in not reversing the decree. The transcript shows that lots 2 and 4 in section 5; lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, were selected November 23, 1872, as swamp lands by the State of Oregon, which on August 10, 1892, and March 15, 1895, executed deeds therefor to the plaintiff's grantors and predecessors. The company asserting a right to these lands by virtue of an act of Congress received from the United States patents for the northeast quarter of the southwest quarter of section 7, June 8, 1906; for lots 1 and 2 in that section, December 31, 1907; and for lot 2 in section 5, May 4, 1909. After this suit was commenced the company considering these tracts of land were excluded from the operation of its grant by reason of the state's definite location of swamp land selection, and assuming that the patents referred to were erroneously issued, executed to the United States, December 4, 1912, a deed for the real property last described, which deed was duly recorded in the proper county. Thereafter the company filed in the local land office at La Grande, Oregon, its mineral indemnity selection for these lands, and on May 25, 1914, pursuant to such choice, it received from the United States a second patent for the northeast quarter of the southwest quarter of section 7. The General Land Office rejected the state's selection of lot 4 in section 5, and the north half of the northeast quarter of section 7, for which
108 latter real property the company also filed mineral indemnity selections.

The former opinion in this cause proceeds upon the theory that the company was unquestionably vested with the naked legal title to the northeast quarter of the southwest quarter of section 7, for which it had received the second patent, but that its right to such land was barred by the adverse occupancy of the premises by the plaintiff and his grantors and predecessors. As to the other tracts for which patents had been received by the company, but which it had attempted to deed to the United States, the naked legal title might well be regarded as being held by the company, notwithstanding the signing and recording of its deed. Like any other contract a deed to be valid requires the aggregatio mentium of the grantor and the grantee. In the case before us there is no evidence tending to show that the United States ever accepted that deed, which evidently appears to have been signed and recorded by the company to circumvent the granting of a part of the relief prayed for in this suit. Section 4 of the Act of Congress of February 14, 1859, admitting this state into the Union contains a clause which reads: "Provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary dis-

posol of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof." 11 U. S. Stat. 383. When the patents were thus issued the United States thereby made a primary disposal of the soil, and the title so transferred to the company made it no more immune from attack in the state courts than if such conveyance had been executed by a private party. No error was committed in determining that as to all the real property so patented the company held only the naked legal title, which was defeated by the adverse holding of the plaintiff and his grantors.

The state's selection as swamp land of lot 4 of section 5, 109 and the north half of the northeast quarter of section 7, was rejected by the General Land Office, and the company's selection thereof as mineral indemnity was approved by the local office. No patent for any part of this land has ever been granted, and the title thereto is in the United States. While the title so remains, a state court is powerless legally to interfere therewith. It should be the duty of such a tribunal, however, when it finds two parties who are seeking to obtain the title to government land, to protect the possession of him that apparently has the better right until the controversy can be adjudicated by the agencies appointed by the United States for that purpose. *Kitcherside v. Myers*, 10 Or. 21; *Jackson v. Jackson*, 17 Or. 110; 19 Pac. 847; *Hindman v. Rizer*, 21 Or. 112; 27 Pac. 13; *Pacific Live Stock Co. v. Gentry*, 38 Or. 275; 61 Pac. 422; 65 Pac. 547; *Borman v. Blackmon*, 60 Or. 304; 118 Pac. 848.

The decree will, therefore, be modified so as to enjoin the defendants, their agents, servants, etc., from interfering with or disturbing the plaintiff's possession of the real property last described until the question is determined in the manner suggested. With this alteration the former opinion is adhered to in all respects.

110 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of October, 1916.

On this Tuesday the 30th day of January, 1917, the same being the fortieth judicial day of said term, there were present:

Thomas A. McBride, Chief Justice; Henry J. Bean, Associate Justice; Henry L. Benson, Associate Justice; Lawrence T. Harris, Associate Justice; Frank A. Moore, Associate Justice; George H. Burnett, Associate Justice; Wallace McCamant, Associate Justice; J. C. Moreland, Clerk; whereupon, among others, the following proceedings were had:

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, THE FARMERS LOAN AND Trust Company, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

In Bank Appeal from Umatilla.

This cause having, at Pendleton, on the first day of November, 1916, been duly tried, argued and submitted to the court, and then reserved for further consideration, and the court having on the 19th day of December, 1916, rendered a decree herein, affirming the decree of the court below, and a petition for rehearing having been filed and duly considered by the court.

It is now here ordered, adjudged and decreed by the court that the decree of the court below be and the same is modified by enjoining the appellants, their agents, servants and employees from interfering with or disturbing the respondent's possession of the real property described in the proceedings herein until the question of the real ownership is determined by the tribunals of the United States, otherwise said decree as rendered on the 19th day of December, 1916, be and the same is in all things affirmed.

111 STATE OF OREGON,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copies of Complaint, Answer, Reply, Opinion, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal and Undertaking on appeal, and the Printed Abstract, constituting the record on appeal to this court from the Circuit Court of the State of Oregon for Umatilla county, in the case of E. W. McComas, Plaintiff, vs. Northern Pacific Railway Co. et al., Defendants, and also the Opinion of this court, and the Decree entered thereon on the 19th of December, 1916, and the Petitions for Rehearing filed herein by both plaintiff and defendants, the opinion of this court on said petition and the order made January 30, 1917, overruling same, have been by me compared with the originals and that they are true and correct copies therefrom, and of the whole of each original, as the same appears of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Oregon at the City of Salem, Oregon, this 10th day of March, 1917.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND, *Clerk*,
By ARTHUR S. BENSON, *Deputy*.

Received — — —.

UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Being informed that there is now pending before you a suit in which Northern Pacific Railway Company, The Farmers' Loan & Trust Company, Trustee, and other persons unknown to plaintiff, are appellants, and E. W. McComas is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court for Umatilla County, State of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,895. Supreme Court of the United States, No. 1065, October Term, 1916. Northern Pacific Railway Company vs. E. W. McComas. Writ of Certiorari. Filed May 8, 1917. J. C. Moreland, Clerk of the Supreme Court. By Arthur S. Benson, Deputy.

In the Supreme Court of the State of Oregon.

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants.

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the transcript of the record of the proceedings in this court in the above entitled cause, heretofore certified

by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this court.

In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States and directed to the Supreme Court of the State of Oregon, dated April 26, 1917, I now hereby certify that on the 8th day of May, 1917, there was filed in my office a stipulation in the above entitled cause in the following words, to wit:

(Endorsed:) "No. —. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent vs. Northern Pacific Railway Company, a corporation, The Farmers Loan and Trust Company, a corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants. Stipulation. Filed May 8, 1917, J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy."

"In the Supreme Court of the State of Oregon.

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants.

Stipulation.

"It is hereby stipulated between Appellants, Northern Pacific Railway Company and The Farmers' Loan and Trust Company, Trustee, and Respondent, E. W. McComas, that the transcript already filed in the office of the Clerk of the Supreme Court of the United States with the petition for writ of certiorari be taken as a return to said writ, dated the 26th day of April, 1917.

"Dated this 4th day of May, 1917.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
Attorneys for Appellants.
JAMES H. RALEY,
J. R. RALEY,
Attorneys for Respondent."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of said Supreme Court

of the State of Oregon at the City of Salem, in said State of Oregon this 8th day of May, 1917.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon,
By ARTHUR S. BENSON, *Deputy.*

[Endorsed:] 1065/25,895. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent, vs. Northern Pacific Railway Company, a corporation; The Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants. Certificate of Clerk.

[Endorsed:] File No. 25,895. Supreme Court U. S. October Term, 1916. Term No. 1065. Northern Pacific Railway Co., Petitioner, vs. E. W. McComas. Writ of Certiorari and return. Filed May 29th, 1917.